

Land Use Law Update

Notable Cases 2003-2006

Utah Counties Insurance Pool

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I. Legislative/Administrative Distinction

Bradley v. Payson, 70 P.3d 47 (Utah 2003)

Facts - Payson denied a request to rezone property from low density to medium density residential. The District Court reversed the City's decision as arbitrary and capricious because the City's decision was based on public opposition and not substantial evidence, notwithstanding agreement that the decision was legislative in character. The parties disputed whether the "substantial evidence" or "reasonably debatable" standard of review applied to the case. The Utah Court of Appeals decided that the "reasonably debatable" standard was appropriate, and reversed the District Court decision.

Decision - The "arbitrary and capricious" (or "reasonably debatable") standard of review includes two alternative components. Legislative decisions, which clearly include rezoning of property, are reviewed under the deferential "reasonably debatable" standard of review. To prevail, plaintiffs must show the City's zoning decision "could not promote the general welfare." The non-deferential "substantial evidence" standard applies to administrative and quasi-judicial proceedings. Thus, the Utah Supreme Court agreed with the Utah Court of Appeals decision, but concluded that the Utah Court of Appeals did not have appellate jurisdiction over the case. Therefore, the Utah Supreme Court vacated the Utah Court of Appeals decision and substituted its own similar decision in its place.

Commentary - This decision upholds the long-standing analytical distinction between legislative and administrative/quasi-judicial decisions. The great degree of deference traditionally granted to legislative decisions is appropriate because zoning decisions are highly political proceedings where the law is being made, not applied to an individual case. Applying the substantial evidence standard to legislative land use decisions would severely limit the discretion of local legislative bodies.

II. Condemnation

Utah County v. Ivie, 137 P.3d 797 (Utah 2006)

Facts - The issue in this case was whether Utah County could condemn a road for the benefit of Provo City. Although the proposed road would connect two existing City streets, it would cut across the Ivie property, located in an unincorporated island of Utah County. Two years earlier the Court ruled against Provo City's attempt to condemn the Ivie property holding the City did not have the power to condemn a road located outside the City limits because Provo was not a charter city. (The Legislature later amended Section 10-8-2 of the Utah Code to allow noncharter cities to exercise the power of eminent domain both inside and outside city boundaries. See Utah Code Ann. § 10-8-2(1)(b) to (d)).

After the adverse ruling, Provo contracted with Utah County which agreed to condemn the Ivie property if Provo would pay the County's expenses. Ivie claimed the County was unlawfully "lend[ing] its condemning powers to Provo City."

Decision - The court held the agreement between Provo City and Utah County was valid under their general contracting authority and did not evidence bad faith. Ivie claimed the agreement was invalid under the Interlocal Cooperation Act ("ICA") because under the ICA each party to an agreement must have the power to do all acts contemplated in the agreement. However, the Court concluded "that although the ICA does not provide a source of power for cooperative action between local governments of unequal power in their area of inequality, it also does not preclude local governments from contracting with each other in these areas under their general contracting power."

Where a local government has authority to condemn, the federal constitution requires only that a property owner have an adequate mechanism for obtaining compensation. There was such a mechanism in this case. The district court's order of immediate occupancy was affirmed because Utah County presented prima facie evidence that the condemnation action was appropriate and no evidence was presented that the district court abused its broad discretion on this issue. The case was remanded for further proceedings in accordance with the opinion.

Commentary - This case illustrates that although a local government may not have power under one source of authority to accomplish a particular goal, there may well be other authority to do so. Generally, local government authority is broadly construed. See *State v. Hutchinson*, 624 P.2d 1116 (Utah 1980) and *Municipal Building Authority v. Louder*, 711 P.2d 273 (Utah 1985).

III. Conditional Use Permit

***Blackburn v. Washington City*, 101 P.3d 391 (Utah App. 2004)**

Facts - A machinery company applied for and eventually received a conditional use permit to construct and operate a commercial facility. Neighbors filed a petition for review of the planning commission's decision. The court granted summary judgment to both the city and the company.

Decision - Neighbors contended the trial court erred by granting summary judgment to the City and the company because the planning commission failed to mail a meeting notice in violation of its own rules, thus making the granting of the company's conditional use permit an illegal act. The appellate court disagreed, finding the zoning ordinance did not require mailed notice to property owners within a 300-foot radius of the company's property (as the neighbors contended) because the planning commission meeting was not a public hearing and the administrative record in the case was already closed. The commission's issuance of the company's conditional use permit was merely the final step in the procedure which commenced with the company's filing of its application a year earlier. At that time notice was properly given. While not all of the neighbors received notice, their due process rights were not violated because their concerns and objections to the conditional use application were presented and taken into consideration by the commission.

Commentary - Whether a public meeting is also a public hearing is a matter to be determined by state law and local ordinance. Once a public hearing is held as required, no further hearing is required even if the approving entity conducts further proceedings.

***Derian v. West Point City*, 2005 UT App 243**

Facts - Derian argued the City acted arbitrarily and capriciously when it refused to renew a conditional use permit and home occupation business license. In December 2003, the City informed Derian that her permit and license would not be renewed. At Derian's request a hearing was held regarding this decision before the West Point City Council. After hearing testimony from each side, the City Council entered its findings and conclusions and determined that Derian failed to comply with the

requirements set forth in certain City ordinances regarding home occupations. As a result, the City Council revoked Derian's conditional use permit and did not renew her business license.

Decision - The Court upheld West Point City's decision because substantial evidence showed the applicant's failure to follow applicable zoning requirements.

Commentary - This case illustrates the courts will not second-guess an administrative decision if substantial evidence is in the record to support it.

***Donner Crest Condominium Homeowners' Association v. Salt Lake City*, 2005 UT App 163**

Facts - Two homeowners' associations challenged a summary judgment in favor of Salt Lake City and the applicant. Appellants argued the City acted arbitrarily, capriciously, and illegally when its Planning Commission approved the application for a planned development conditional use permit filed by the applicant.

Decision - The appeals court ruled that it could not conclude that the City acted arbitrarily, capriciously, or illegally when it granted a planned development conditional use permit for the applicant's project, which was compatible with the character of adjacent parcels and the intent of the zoning district and was sufficient in size. Because the applicant's project qualified as a planned development, the Planning Commission was authorized to change, alter, modify, or waive zoning requirements applicable to the project, including the frontage requirements and flag lot restrictions. Thus the applicant was not required to apply for a variance from the Board of Adjustment. Furthermore, in granting the applicant's permit for a planned development conditional use, the Planning Commission did not single out the project for a separate zoning classification or allow the applicant a use inconsistent with neighboring projects.

Commentary - A conditional use permit is an administrative application subject to the substantial evidence rule. Here, there was enough evidence in the record to justify the decision made. On July 21, 2005 the Utah Supreme granted a petition for certiorari. See 124 P.3d 251 (Utah 2005).

***Uintah Mountain RTC, LLC v. Duchesne County*, 127 P.3d 1270 (Utah 2005)**

Facts - In this case, the Utah Court of Appeals reinstated a conditional use permit for a group home in Duchesne County. The Planning Commission initially approved the permit finding that it met County Code standards. After an appeal by neighbors, the County (presumably the County Commission) reversed the Planning Commission decision and denied the CUP because the proposed group home (i) would not be compatible with other uses, (ii) would generate too much traffic and (iii) would be harmful to public safety and welfare.

Decision - The Court held the County acted arbitrarily and capriciously in overturning the Planning Commission because the decision was based on public clamor rather than substantial evidence. The court upheld the County's decision to limit group home occupants to ten persons because the group home application provided "insufficient information and plans detailing how they intended to house more than ten residents." However, the court noted that "to the extent that the County's [occupancy] decision was based upon economic viability, it was improper" because the County Code did not include economic viability as a criterion for deciding a CUP. The court implicitly suggests that such a criterion may be appropriate to include as a standard for approving a CUP.

Commentary - Interestingly, the case does not turn on whether the occupants of the group home would be "disabled" under the federal and state fair housing acts apparently because the issue was inadequately briefed. Analytically, it was certainly easier for the court to resolve the case on the basis of inadequate findings rather than the more thorny issue of who has a disability and whether group home occupants would qualify for the protections provided under the FHA and UFHA. The case is very similar to *Davis County v. Clearfield City* (1988) which is often-cited for the proposition that public clamor is never an appropriate basis for making an administrative, quasi-judicial land use decision.

IV. Exhaustion of Remedies

***Patterson v. American Fork*, 67 P.3d 466 (Utah 2003)**

Facts - Patterson owned several residential developments in American Fork and alleged the City violated his civil rights by imposing various fees, inequitably applying City ordinances, refusing to permit development in some locations, failing to annex some property, and other actions that Patterson described as "unreasonable, arbitrary, capricious and illegal." Patterson claimed equitable estoppel/detrimental reliance, deprivation of civil rights under 42 U.S.C. § 1985(3), violation of 42 U.S.C. § 1983, declaratory relief, injunctive relief, deprivation of liberty and property without due process of law under the Fifth Amendment of the United States Constitution, violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution, violation of the due process and equal protection provisions in the Utah Constitution, violation of fundamental principles embodied in the Utah Constitution, and unlawful retaliation.

Decision - Patterson's non-equitable state-law claims were time-barred because he failed to timely comply with the Utah Governmental Immunity Act notice of claim requirements. The UGIA generally does not apply to equitable state-law claims. However, they were properly dismissed by the trial court because Patterson failed to exhaust his administrative remedies. Patterson's federal § 1983 claim was dismissed because this case involved disputes about local development issues, not deprivation of constitutional rights. Patterson also failed to allege an equal protection violation under § 1985 or the equal protection clause. In particular, he failed to allege that any unequal treatment was the result of intentional discrimination grounded in personal animus or why he was allegedly singled out for unfair treatment. Finally, the Court found the federal takings claim was unripe because he did not first file an inverse condemnation action in state court.

Commentary - Despite the multitude of claims Patterson made, this case demonstrates that a potential plaintiff must exhaust his remedies before going to court. This includes pursuing local review/appeal procedures. Moreover, having done so, claims must be supported by specific facts and not mere allegations of unfair treatment.

V. Housing Discrimination

NAACP, et al., v. Summit County, 2006 U.S. Dist. LEXIS 48972

Facts - Anderson Development and other plaintiffs filed a proposed class action lawsuit against Summit County alleging exclusionary zoning practices and housing policies in violation of federal law. Anderson submitted several "property plats" to the County but expressly did not request the County to process its submissions. Instead letters were submitted which claimed the County's development code was legally defective and unenforceable. The County responded that it had no choice but to enforce the adopted zoning law and offered assistance in understanding the County's planning process. Instead of seeking assistance, however, Anderson filed a complaint alleging the County code violated constitutional and statutory rules and asked the court to invalidate the County's 1998 development code (although a revised code was adopted in 2004).

Decision - The court ruled Anderson and other plaintiffs had no standing to bring the suit because "they have not alleged and cannot prove that the County has utilized the zoning ordinances or other challenged policies to deny any specific project containing housing which would allegedly benefit [them]." In addition, the court said "Plaintiffs have not demonstrated that it is likely that any alleged housing discrimination injury would be redressed by a favorable decision. They cannot identify any particular housing project that will be build (sic), nor any personal housing benefit they will receive if the court granted their requested relief on their housing discrimination claims." Without standing to litigate their claims, the court dismissed the case. A related state court case is still pending.

Commentary - This case illustrates that in order to have standing to sue a plaintiff must show an injury that is different from other persons generally affected by an allegedly illegal act. Here, the mere filing of plats was not enough to achieve standing. To do so a person must make an application and give the approving authority an opportunity to apply its ordinances to the application at hand. That, of course, is a more costly and time-consuming proposition than merely making allegations.

VI. Impact Fees

***Jordan School District v. Sandy*, 94 P.3d 234 (Utah 2004)**

Facts - After Sandy City adopted a storm sewer drainage utility ordinance, the school district sought a declaration that LUDMA limited the city's authority to charge drainage related fees. The school district argued that LUDMA prohibited municipalities from imposing fees on school districts with the exception of those fees specified in 10-9-106 and that storm sewer drainage fees were not specified. The district court held the fee was permissible.

Decision - The Utah Supreme Court held § 10-9-106 did not prohibit the imposition of service fees. Sandy's ability to collect service fees, authorized by Utah Code § 17A-3-315(1) was independent of LUDMA's proscription. Further, storm drain fees could qualify as service fees. Although a school district did not "consume" storm water runoff in the same way it consumed water or electricity, it consumed storm drain "services." Accordingly, a storm sewer drainage fee could properly be labeled a service fee and was akin to the specific charges mentioned in § 17A-3-315. The court also rejected the school districts claim that the service fees were really an impact fee.

Commentary - Although Sandy City could have funded its storm drain system with impact fees, the Court deferred to the Sandy's judgment about that. The courts allow local governments considerable latitude in finding solutions to problems created by urban growth.

***Washington County Water Conservancy District v. Keystone Conversions, LLC*, 103 P.3d 686 (Utah 2004)**

Facts - A developer filed a complaint asking the court to determine whether a fee charged by a water district was an impact fee subject to the Impact Fees Act. The trial court agreed with the developer, concluding the fee was an impact fee.

Decision - The facts objected to by the water district were not the basis of the trial court's ruling nor were they factual findings. The Impact Fees Act requires an entity which imposes a fee as a condition of proceeding with development to fund public facilities and services necessitated by the development to satisfy the requirements of the Impact Fees Act. Because the approval given by the water district did not actually authorize the commencement of development activity, the availability fee charged by the water district did not constitute an impact fee.

Commentary - This case helps further refine the distinction between impact fees and other fees charged by local government to fund services provided.

VII. Ordinance Interpretation/Violation

***Carrier v. Salt Lake County*, 104 P.3d 1208 (Utah 2005)**

Facts - Salt Lake County approved expansion of a gravel pit after determining gravel pit operations constituted "mineral extraction and processing" which was a use allowed by the applicable zone. The County also decided that certain evidence justified waiving some of the development standards required by an overlay zone. The District Court granted summary judgment to a citizens group which challenged the County's decision.

Decision - The County argued that approval of the gravel pit expansion did not violate County

zoning requirements because gravel was a mineral. While granting some deference to a local authority's interpretation of its ordinance for correctness, the Court ruled against the County. It held that omission of gravel pits as a conditional use suggested they were not an authorized use in the zone. Allowing a gravel pit would be inconsistent with the zone's purpose, particularly where damage would result to both the natural and scenic resources from a gravel pit operation. Under Utah's Mined Land Reclamation Act it was reasonable to interpret the term "mineral extraction and processing" to exclude gravel pit operations. The judgment was affirmed.

Commentary - The outcome of this case hinged on the interpretation of terms in the County zoning ordinance and illustrates the need for clear definitions. Gravel pits produce needed resources for highways and buildings. Unfortunately, they can impact our canyons and neighbors, particularly when they are expanded. In this case, the Court was unwilling to broadly construe the ambiguous term "mineral" in favor of allowing the gravel pit expansion.

***Foutz v. City of South Jordan*, 100 P.3d 1171 (Utah 2004)**

Facts - Foutz and others failed to appeal a decision by the South Jordan City Council to allow a parking structure within 30 days as required by LUDMA. They attempted to get relief by styling their request as an enforcement action alleging that the plan for the parking structure violated a City ordinance. The trial court dismissed their claim for declaratory and injunctive relief against the City.

Decision - The Supreme Court affirmed the District Court decision holding that the filing of the petition was not timely because it was more than 30 days after the decision was made. LUDMA requires parties seeking redress from a municipal land use decision to file a petition for review within 30 days after the decision is rendered. The City's failure to stop construction of the parking structure did not constitute a continuing violation subject to zoning enforcement because the land use decision was made when the City Council voted on the site plan.

Commentary - This case makes clear that LUDMA's statute of limitations runs from the time when a municipality renders a land use decision. Claimants cannot avoid it by characterizing their challenge as a zoning enforcement action.

***Intermountain Sports, Inc. v. Utah Department of Transportation and Murray City*, 103 P.3d 716 (Utah App. 2004)**

Facts - From 1997 to 2001 UDOT completed a massive reconstruction of I-15 that included constructing a new interchange at 4500 South. Intermountain operated its business near 4500 South but enjoyed access from 500 West. The reconstruction required temporary closings of 4500 South. At no time was traffic affected along 500 West. Intermountain claimed that UDOT gave other businesses better access along 4500 South than it provided Intermountain. Intermountain claimed that UDOT had taken its property and must pay damages for violating the uniform operation of laws clause of the Utah Constitution. (Only the second claim is discussed here.) Article I, section 24 of the Utah Constitution provides: "All laws of a general nature shall have uniform operation." This is Utah's equivalent to the equal protection clause of the United States Constitution that forbids certain forms of discrimination. The trial court dismissed Intermountain's claims. UDOT on appeal argued that the uniform operation of laws clause was not self-executing and that even if Intermountain stated a claim under the uniform operation of laws clause, it was not entitled to damages.

Decision - The Court of Appeals held that the uniform operation of laws clause of the Utah Constitution is self-executing, meaning that it is enforced by courts without any implementing legislation. The Court agreed with UDOT, however, that Intermountain was not entitled to damages. Damage claims for a constitutional violation must satisfy three elements, and Intermountain did not satisfy two of them. First, it was questionable whether Intermountain established that it had suffered a flagrant violation of its constitutional rights. Second, Intermountain failed to establish that existing remedies do not redress its injuries. The Court noted that Intermountain should have exhausted its

administrative remedies before filing its court action. Third, Intermountain failed to demonstrate that equitable relief, such as an injunction, was unavailable. Intermountain should and could have sought an injunction to enjoin UDOT's discriminatory actions during the reconstruction project.

Commentary - A uniform operation of laws violation is difficult to establish, particularly if the plaintiff is seeking damages for a deprivation of this right. If the government is depriving constitutional rights, then seek immediate relief without delay. Requiring exhaustion of administrative remedies seems inconsistent with the notion that the uniform operation of laws clause is self-executing, but the courts have enforced the exhaustion requirement nonetheless.

***Johnson v. Hermes Associates, Ltd.*, 128 P.3d 1151 (Utah 2005)**

Facts - In this opinion, the Utah Supreme Court finally settled a long-running dispute between Hermes, developer of the Family Center in the Fort Union area of Midvale, and a family with adjoining property affected by construction of a large retail building in the shopping center. Although the family formally notified Hermes that construction of the proposed building would encroach on a public street and restrict their access to the street as well as public utility and other services, Hermes, after getting exceptions from the County, finished the building. The family sued, claiming Hermes violated County ordinances, roadway standards, and a conditional use permit issued by the County. After a lot of legal wrangling, in 2001 the Utah Supreme Court ruled in the family's favor, concluding the streets at issue were public and must comply with the terms of the CUP and other County requirements. It also held that the County's grant of road exceptions was erroneous because the County failed to follow its own rule for granting exceptions. The Court then sent the case back to the district court to determine the extent of the family's injuries. Among other things, the district court required Hermes to remove those portions of the buildings that were unlawfully constructed and to reconfigure the adjoining streets.

Decision - The Court the district court decision, noting in particular that "due to Hermes willful and intentional violation of the zoning ordinance, complete restoration of the property to its pre-encroachment status is appropriate.

Commentary - This case illustrates the importance of carefully following legal requirements, particularly when governmental procedures are challenged as incorrect. When a procedure is challenged, it may be necessary to repeat the procedure or make needed corrections early in the process. If a determination is made that no correction is needed, fully document the basis for that conclusion so a reviewing court can understand it.

***Ogden v. Edwards*, 105 P.3d 949 (Utah App. 2005)**

Facts - Defendant appealed a conviction for failure to register a vacant building with the city and failure to file a vacant building plan. Defendant argued that Ogden City, Utah, Municipal Code § 16-8B was void in its entirety because the city failed to comply with the adoption requirements for zoning ordinances. He further contended that his conduct did not satisfy the elements of Ogden City, Utah, Municipal Code § 16-8B-3.

Decision - The appellate court initially noted that because Ogden City, Utah, Municipal Code § 16-8B did not provide for any geographical segregation, the adoption of the code provision was not an exercise of its zoning powers; therefore, the adoption requirements for zoning ordinances were inapplicable to the city's adoption of Ogden City, Utah, Municipal Code § 16-8B. However, the appellate court held that the city did not prove that defendant's buildings were vacant for more than 90 days, or were vacant and contained 1 or more public nuisance violations; thus, it did not prove every element of the charged crimes beyond a reasonable doubt. Because the city failed to prove that defendant was guilty of failing to register his buildings under Ogden City, Utah, Municipal Code § 16-8B-3, he could not have been obligated to file vacant building plans for his buildings.

***Young Electric Sign Company, Inc., v. State of Utah*, 110 P.3d 1118 (Utah App. 2005)**

Facts - The Utah Department of Transportation ("UDOT") denied YESCO a permit for a sign adjacent to a freeway because the proposed sign location was within 500 feet of an interchange in violation of Utah Code provisions.

Decision - The appellate court concluded the trial court erroneously interpreted various provisions of the Utah Outdoor Advertising Act. The point of widening was where the on-ramp lane physically merged into the main-traveled way. In places where there was an acceleration lane, the point where the intersecting lane began to parallel the other lanes constituted the point of widening. Because the point of widening could never be greater than 2,640 feet from the center line of the intersecting highway of the interchange, the district court erred by ruling that the widening occurred 2,937 feet from the center line. An acceleration lane existed because a lane existed that met the northbound lanes of I-15 and the continued on for 1,783 feet before finally merging into the outside lane; its purpose had to allow vehicles to increase their speed to merge with I-15 traffic. The Act prohibited advertising signs within 500 feet from the point of widening. The company's proposed sign location was permissible since it was 846 feet beyond this point.

Commentary - This case illustrates that even when a statute attempts to address an issue in detail, confusion can still result about the intent of the rule.

VIII. Owner Occupancy

***Anderson v. Provo City*, 108 P.3d 701 (Utah 2005)**

Facts - Property owners challenged a zoning ordinance amendment which allowed accessory apartments only in owner-occupied homes in an area adjacent to Brigham Young University. The District Court granted summary judgment to the City.

Decision - The ordinance was upheld. Non-occupying owners were not prevented from renting their homes, but only from renting accessory apartments, an activity that would not be permitted at all in the absence of the original ordinance. The restriction was justified because it balanced the City's interest in accommodating needed student housing while also preserving the character of single-family residential neighborhoods. The amendment was within the City's zoning power and did not violate the uniform operation of laws provision of the Utah Constitution. Even assuming the amendment indirectly restrained alienation of property, it was reasonably necessary to protect the City's legitimate interest in preserving the character of the affected neighborhoods. The amendment did not burden the right to travel.

Commentary - Although some treatise writers suggest that regulating owner occupancy is improper, this case illustrates one circumstance in which it is lawful. One of the apparent reasons for the Court's favorable decision was the substantial amount of research in the legislative record which demonstrated the connection between owner occupancy and neighborhood preservation.

IX. Referenda

***Carpenter v. Riverton City*, 103 P.3d 127 (Utah 2004)**

Facts - Riverton residents filed a petition for extraordinary relief challenging the City's refusal to place on the ballot a referendum seeking repeal of a zoning ordinance. They challenged the City's adoption of a zoning ordinance that allowed commercial and residential development of a large piece of land despite significant public opposition. After the required number of signatures were obtained to place the matter on the ballot, the original ordinance was repealed and four new ordinances were enacted covering the same property. The referendum challenging the original ordinance was taken off the ballot. The residents' petition asked that the referendum challenging the original ordinance be deemed applicable

to the later enacted ones. They claimed the City repealed the original ordinance and enacted the later ones to frustrate their attempt to overturn the rezoning by referendum.

Decision - The Court dismissed the resident's petition because they failed to demonstrate the City acted in bad faith by repealing the original ordinance and enacting the later ones.

Commentary - After losing in the Supreme Court, Riverton residents launched a new petition drive to place the four new ordinances on a referendum ballot. The City, however, determined they did not meet their filing deadline because they were filed with the county clerk instead of the city recorder. Residents argue that a procedural mistake should not thwart their referendum right and are attempting to use *Mouty v. Sandy* (cited above) to prove their point.

***Mouty v. Sandy*, 122 P.3d 521 (Utah 2005)**

Facts - Residents filed an application for an extraordinary writ to compel Sandy City to accept and file a referendum petition challenging a zoning ordinance. Sandy amended one of its zones to allow additional uses in an area formerly occupied by gravel pit. The residents were able to secure more than the required number of signatures but the City rejected the petition, concluding more signatures were required since the ordinance in question was a "land use law." The residents filed action to compel the City to accept and file the referendum petition.

Decision - The Supreme Court granted the writ because the Utah Constitution guarantees residents the right to refer legislative action to the voters and the City Council exercised its legislative authority when passing the ordinance. The Court further held the ordinance was not an exempt "land use law" as defined in Utah Code § 20A-7-601 because it was not a comprehensive act. Consequently, the statutory requirements for initiating a referendum were met. The Court also found the developer did not have a vested right which would override the citizens' referendum right.

Commentary - This case has generated considerable controversy and perhaps raises more questions than answers. Certainly it has encouraged citizen group's interested challenging city zoning decisions through a referendum. The Court said every act by legislative body in a city operating under the optional council-mayor form of government is a legislative act subject to referendum.

X. Sexually-Oriented Business

***American Bush v. South Salt Lake City*, 2006 UT 40**

Facts - American Bush, a sexually-oriented business, sued the city after it passed an ordinance prohibiting nudity by sexually-oriented business employees. American Bush claimed the Utah Constitution protects nude dancing. The district court upheld the ordinance finding that although the constitution guarantees Utah citizens' rights to "communicate freely with their thoughts and opinions" it did not include nude dancing in an SOB.

Decision - The trial court decision was upheld. Obscene speech was an exception to protected speech when the Utah Constitution was drafted. In addition, nude dancing was illegal both before and after the Utah Constitution was ratified. Extending free speech protection to nude dancing would be clearly contrary to the intent of the constitution.

Commentary - This is an important case which establishes that when the provisions of the Utah Constitution are interpreted, great weight must be given to the intent of the drafters.

***Dr. John's Inc. v. City of Roy*, 333 F. Supp. 2d 1168 (2004)**

Facts - Dr. John's opened a business in Roy under a general business license, but the City shortly thereafter passed an ordinance requiring the owner to obtain a sexually-oriented business ("SOB") license. Dr. John's sued, claiming the City's SOB ordinance violated the First Amendment because it impinged upon constitutionally protected speech, was impermissibly vague, failed to leave open adequate alternative avenues of communication, vested unbridled discretion in licensing officials, and did not

provide for prompt judicial review of licensing decisions. Dr. John's requested a delay on the licensing decision until the then pending Midvale case was decided in the Utah Supreme Court. Even though the decision in Midvale rejected every argument tendered by Dr. John's, Dr. John's proceeded with its action against Roy City.

Decision - The SOB ordinance was not subject to a facial constitutional challenge because the ordinance did not implicate First Amendment concerns. It sufficiently limited the discretion of local officials and adequately provided for judicial review. First Amendment concerns were not implicated because the ordinance did not operate as an improper prior restraint on protected speech. Rather, it was directed at controlling at secondary effects of SOBs and not the content of speech. As such, the Court reviewed the ordinance as a content-neutral regulation subject to intermediate judicial scrutiny. The Court found the ordinance was narrowly tailored to serve a substantial government interest, that the City relied on valid studies in enacting the ordinance, and that it left open ample alternative communication channels. Whether the business was, in fact, a sexually oriented business was a decision for state authorities.

Commentary - The Roy ordinance provides a good model for localities to follow, although the case is on appeal to the 10th Circuit Court of Appeals.

***Midvale City Corp. v. Haltom*, 73 P.3d 334 (Utah 2003)**

Facts - Dr. John's, Inc., managed by Haltom, commenced business and applied for a general business license, omitting from the license application mention of the numerous sexually-oriented items to be sold in the store. The City admonished Haltom to apply for a sexually oriented business (SOB) license, and refused to approve the general business license. Dr. John's operated thereafter without a license, and the City obtained a restraining order, which Dr. John's violated by continuing to operate. The City requested a court hearing, in which it was determined that Dr. John's was doing business as an SOB without an SOB license, and the Court permanently enjoined Dr. John's from doing business in Midvale. On appeal, Dr. John's argued that the SOB ordinance was unconstitutional on its face (as vague and overly broad), and that the SOB licensing ordinance was an invalid content restriction rather than a legitimate time, place and manner restriction.

Decision - Defendants have no standing, because they allege no harm arising from the licensing procedure, except classification as a sexually-oriented business, and they allege no specific harm from that classification. Municipal discretion in the licensing procedure does not threaten to impose any restriction on communication.

Commentary - The standing issue actually disposed of the case, but the Utah Supreme Court majority opinion contained dicta on the other issues. Three of the four majority justices also joined in a concurring opinion to offer alternative rationales for some of the issues treated by way of dicta. One justice dissented, insisting on a prior restraint analysis, and considering the Midvale ordinance defective in leaving open the possibility of unreasonable delay in resolving licensing issues. This potential defect was not present in the Roy City SOB licensing ordinance.

XI. SLAPP Suit

***Anderson Development v. Tobias*, 116 P.3d 323 (Utah 2005)**

Facts - Tobias and Feld organized an entity to oppose a commercial development in South Jordan proposed by Anderson Development. They contacted property owners with their concerns, including the Williams who were under contract to sell to Anderson. Anderson responded by filing a claim for intentional interference with economic relations. Tobias and Feld responded with counterclaims, including a claim that Anderson's suit was an unlawful SLAPP suit ("strategic lawsuit against public participation"). They claimed damages and attorney's fees as provided in UCA 78-58-105 (the "SLAPP Act"). Tobias and Feld also filed an infliction of emotional distress counterclaim. They prevailed on the

dispositive aspects of Anderson's intentional interference claim, except one. The Court remanded the claim back to District Court to determine whether Tobias and Feld misrepresented their ability to raise funds to find a willing buyer for the Williams property and whether their actions were enough to require damages to Anderson. Anderson lost its contract with Williams and claimed Tobias and Feld's interference caused the price of a renewed contract to increase by \$175,000. The Court noted the price increase might have resulted from market forces rather than action by Tobias and Feld.

Decision - The Court held that the SLAPP Act "unambiguously" provided a remedy to Tobias and Feld for action "commenced or continued" under the Act. The Court also said the Act is not an unlawful bill of attainder and declined to address Anderson's other constitutional claims because they were not adequately briefed. Tobias and Feld were thus allowed to pursue their SLAPP Act claim against Anderson. If they prevail, the Court left the door open for possible punitive damages against Anderson under UCA 78-18-1. The decision also includes a helpful explanation of the difference between "abuse of process" and "wrongful civil proceedings."

Commentary - As the result of this case, developers may be less likely to file SLAPP suits. Perhaps neighbors will be less fearful about speaking in opposition to proposed development. Although neither party in the case got everything they wanted, significantly, the Court said Anderson might have to pay damages to Tobias and Feld. This case was recently settled and included a \$50,000 payment from Anderson to Tobias and Feld.

XII. Subdivision

***South Eagle v. Utah County*, 2005 UT App 278**

Facts - A company appealed a Utah County Board of Adjustment decision denying its application for a proposed subdivision of land. The Board concluded that it was not reasonable to expect the company's land to be profitable under the proposed subdivision. In support of its conclusion, the Board considered statements from the planning commissioner, the company's representative, and various members of the planning commission that water was not readily available to support the land, that dry farming was not feasible, and that the company might not qualify for grazing on some of the lots. A lower court upheld the decision.

Decision - The appellate court upheld the lower court decision and noted that substantial evidence supported the Board's conclusion that it was not reasonable to expect the company's land to be profitable under the proposed design and applicable Utah Code provisions. The company contended the trial court should have denied the Board's motion for summary judgment because the county commission did not present any evidence on whether the property would have been used for non-agricultural purposes. The appellate court held the company's argument was unavailing because the company's parcels did not meet the requirements of Utah Code.

Commentary - The case is another illustration of the application of the substantial evidence rule.

XIII. Taking-Federal Cases

***Kelo v. City of New London*, 125 S. Ct. 2655 (2005)**

Facts - Unable to acquire nine parcels of property as part of a 90 acre redevelopment project, the New London Development Corp. (an agent of the city) condemned the property. The property was not blighted but was within the redevelopment area. After losing in the trial court, the city prevailed in the Connecticut Supreme Court which upheld all of the takings.

Decision - Local governments may condemn private property for the purpose of economic development. A taking based on a redevelopment plan serves a public purpose and therefore constitutes a "public use" under the Takings Clause of the Fifth Amendment. The Court deferred to the judgment of the local legislative body. It declined to require a reasonable certainty that the expected public benefits

would accrue and did not second-guess city's determination of what should be included in the redevelopment area. The Court stressed the importance of a "carefully considered" redevelopment plan which provided the basis for the decision to condemn the property. The plan was not adopted to benefit a particular class of identifiable individuals. The Court rejected the contention that future public benefits must be "reasonably certain" to justify the taking. The "public use" standard announced in the case is the federal minimum. States are free to enact a more restrictive standard.

Commentary - Contrary to the claims of many commentators, this case merely upholds existing long-standing law. However, as a result of public outcry, many federal, state and local bodies have introduced or enacted legislation to limit the use of eminent domain for the purpose of economic development.

***Lingle v. Chevron*, 125 S. Ct. 2074 (2005)**

Facts - Chevron Oil sued state officials, alleging a rent cap imposed under state law was an unconstitutional taking. The Ninth Circuit Court of Appeals held a taking had occurred.

Decision - The oft-repeated "substantially advances" test (from *Agins v. Tiburon*) is not a valid basis for analyzing a takings claim (a taking can occur if government action "does not substantially advance legitimate state interests"). This test does not address the magnitude or character of the burden imposed on property as the result of a regulation. Instead, it is more in the nature of a due process test which measures the reasonableness of a regulation. Maintaining the "substantially advances" test would "require courts to scrutinize the efficacy of a vast array of state and federal regulations—a task for which courts are not well-suited." There are four legal theories for evaluating a takings claim:

- a. Where government permanently and physically invades private property a "per se" taking will be found (*Loretto*).
- b. Where government regulations completely deprive an owner of "all" economically beneficial use a "per se" taking will be found, subject to exceptions in "background" nuisance and property law (*Lucas*).
- c. A taking based on a three-factor test: the character of the government's action, degree of economic deprivation, and investment-backed expectations (*Penn Central*). *Penn Central* is the test that will apply to most takings cases.
- d. A land use exaction which violates the nexus and rough proportionality requirements set forth in *Nollan* and *Dolan*.

Commentary - The *Agins* test has been rarely used and the Court recognized it is "doctrinally untenable." Some courts used the presence of a due process claim in a takings to trump a takings claim. This case will help untangle such cases. However, plaintiffs will likely have a difficult time prevailing on a due process claim since any conceivably rational basis for a regulation will usually provide the basis for upholding government action. Some courts have begun to use a "shock the conscience" standard to find a due process violation.

***Rancho Palos Verdes v. Abrams*, 125 S. Ct. 1453 (2005)**

Facts - A lower court ruled a land owner could enforce the zoning limitations of the Telecommunications Act of 1996 ("TCA") through an action for damages and attorney's fees under 42 U.S.C. § 1983.

Decision - The TCA added no remedies to those under § 1983, and limited relief in ways that § 1983 did not. Since the TCA provides a judicial remedy a § 1983 claim is precluded.

Commentary - This case clarifies that a §1983 claim is not viable if the statute at issue provides a separate remedy.

***San Remo Hotel v. San Francisco*, 125 S. Ct. 2491 (2005)**

Facts - The owners of a hotel sued the city, alleging that an ordinance requiring them to pay an in

lieu fee to convert it to a tourist hotel was a taking. After a federal abstained from deciding the case, the state court rejected the owners claim. The owners refiled the takings claim in federal court seeking to have the claim exempted from the U.S. "full faith and credit" statute. The United States Court of Appeals for the Ninth Circuit ruled against the owners.

Decision - No exception exists to the federal faith and credit statute for takings claims against a state or locality, which must first be brought in state court as required by *Williamson County Regional Planning Agency v Hamilton Bank*, 473 U.S. 172 (1985). Issues which are resolved in a state court proceeding cannot be retried again in federal court, despite the plaintiff's attempt to reserve and separate its federal takings claim from state court litigation.

Commentary - The plaintiffs thought this case might resolve the "'Williamson County' shuffle" which effectively erected a ripeness barrier to takings cases. *Williamson County* requires takings claimants to first ask the state to pay a takings claim under state law. If the claim is rejected, the case is then presumably ripe for federal court consideration. Typically, if a property owner first files suit in federal court, a government defendant can have the case dismissed as unripe, forcing the owner to file the case in state court. If the litigant thereafter loses in state court and files the claim in federal court, he is told that the state court judgment precludes a federal trial because he is already had his day in court. Four justices concurred with the idea that *Williamson County* "may have been mistaken." But no decision was made on that point because no court below had addressed that question and no party had asked the court to consider that issue.

XIV. Taking-Utah Cases

Arnell v. Salt Lake County Board of Adjustment, 112 P.3d 1214 (Utah App. 2005)

Facts - A contractor was denied a building permit for a steep mountain lot because it did not meet the requirements of a hillside ordinance. He filed a just compensation claim for a regulatory taking arguing his claim was ripe for adjudication and the regulation deprived him of all economically viable use of his property. He also claimed the right to rescind his land purchase contract with defendant seller. The district court granted summary judgment in favor of Salt Lake County.

Decision - Summary judgment in favor of the county was reversed and remanded; summary judgment in favor of the seller and against the contractor was affirmed. The appellate court found that absent from the county council's conclusions of law was any mention of a lack of site-specific studies submitted by the contractor. The contractor would not have been granted a variance to build on the lot under any circumstance. Therefore, his takings claim was ripe because the extent that the hillside ordinance restricted development was a complete bar. However, the decision to grant the county's motion for summary judgment was premature because additional factual determinations were necessary and material issues of fact existed regarding the extent to which the hillside ordinance interfered with the contractor's reasonable investment-backed expectations. The contractor's own opinion was insufficient to prove that he suffered a total taking. He was not entitled to rescind the purchase contract lot because his inability to build was not a mutual mistake of material fact. His claim for breach of warranty and implied warranty claim against the seller failed.

Commentary - Anyone interested in learning how to survive a challenge to a local land use decision denying a permit should read the discussion in this case about "findings of fact" and "conclusions of law." It is apparent that the Court did not believe the County's assertions about why the permit was denied.

B.A.M. Development, L.L.C., v. Salt Lake County, 128 P.3d 1131 (Utah 2006) (B.A.M. II)

Facts - A developer appealed the imposition of street improvements by Salt Lake County on 3500 South. The Court of Appeals decided in February 2004 that the requirement to dedicate land, move power lines, and provide street improvements was subject to review for fairness and proportionality and

remanded the matter back to the trial court, instructing the trial court to require the County to hold a hearing and establish a record on the issue of whether the burdens imposed on BAM were proportionate and furthered a legitimate governmental interest. Both parties appealed that decision.

Decision - The Supreme Court held that the matter would not go back to the County, but instead to the trial court so it can take evidence and determine if the requirements were proportional.

Commentary - This decision is significant because it confirmed that exactions of all kinds are subject to the proportionality test, even if imposed by ordinance and not in an administrative proceeding. The Court restated the provisions adopted in Senate Bill 60 that if there is no record established, the trial court can take evidence on the issue of appropriateness and proportionality and make a decision without a remand back to the local government for further consideration.

***B.A.M. Development L.L.C. v. Salt Lake County*, 87 P.3d 710 (Utah App. 2004) (B.A.M. I)**

Facts - BAM received final plat approval for a 44-lot subdivision to be located at 7755 West and 3500 South in Salt Lake County. In the original subdivision plat, BAM agreed to dedicate a 40-foot strip of land in anticipation of 3500 South being widened. A year later, after consulting with UDOT, the County decided BAM needed to dedicate an additional 13-foot strip of land abutting 3500 South in anticipation of future road expansion. BAM objected to the increase because it had already subdivided lots using the 40-foot dedication. Evidence confirmed that BAM's development of 44 homes would increase traffic along 3500 South by about 3-4%. BAM claimed the dedication was a taking of its property without compensation.

Decision - The Utah Court of Appeals never reached the merits of BAM's taking claims. Instead, the Court ruled that the District Court should have set aside the County's decision because neither the County Planning Commission nor the County Commission received evidence in a hearing before rejecting BAM's taking claims. For that reason, a split panel of three judges ruled that the County's actions were arbitrary and capricious. After the District Court on review received evidence and ruled against the developer, the Utah Court of Appeals reversed the District Court and sent the case back to the County for an evidentiary hearing.

Commentary - Unfortunately for the developer, the local government never received any evidence in a hearing. The evidentiary hearing before the trial court turned out to be a complete waste of time and resources. The developer had to return to the local government (not a court of law) to put on evidence of the taking. The effect of the *B.A.M.* decision read in conjunction with the *Patterson* case is that a taking claim must be raised and considered at the local government level and that the district court must limit its review of the local decision on the record. See the Utah Supreme Court decision above (BAM II).

***Diamond B-Y Ranches v. Tooele County*, 91 P.3d 841 (Utah App 2004)**

Facts - Diamond requested a conditional use permit to operate a gravel pit. The County, reacting to concerns about negative impacts to nearby residents and to possible geologic issues continued the application so Diamond could complete an EIS. After a six-month moratorium the County on gravel pit CUPs, the County denied the application citing the same health and geologic concerns. The ranch asserted that a taking occurred because the county's denial of its request for a conditional use permit to operate a gravel pit rendered its property valueless. The district court granted summary judgment to the County, finding Diamond did not have a property interest in a conditional use permit and had not satisfied CUP permit requirements.

Decision - The appeals court held the issue in the case was whether a taking occurred, and not a review of the County's denial of the CUP, finding that Diamond's "property interest . . . is the beneficial use of its property in general." Because the ultimate effect of denying the CUP was factually in dispute, the trial court erred in granting summary judgment. Since the ranch submitted what was required, Diamond's takings claim was ripe for determination. Summary judgment was reversed and the case

remanded to the trial court.

Commentary - The underlying issue in this case is the whether property "use" or "value" is the proper basis for determining whether a per se *Lucas*-type taking has occurred. If the measure is lost value (the difference between the property value with and without the use at issue), total economic deprivation will be hard to find since property almost always some inherent value, even without a particular use. On the other hand, if the loss of property "use" is the proper measure of economic impact on the property, as the court hinted, then a takings claim will be somewhat easier to prove.

***Heughs Land, L.L.C. v. Holladay City*, 113 P.3d 1024 (Utah App. 2005)**

Facts - A landowner sued the City claiming the planning commission's denial of its application for approval of a subdivision plat, together with the City mayor's rejection of an appeal, constituted an unconstitutional taking of property. The trial court dismissed plaintiff's case because a Utah Governmental Immunity Act ("UGIA") notice of claim was not properly filed, thus depriving the trial court of jurisdiction.

Decision - The court clarified that notice-of-claim provisions in the Utah Governmental Immunity Act ("UGIA") do not apply to a takings claim under the Utah Constitution because such claims are "self-executing." The case was remanded for further proceedings.

Commentary - Some litigants have filed UGIA notice of claims to prevent possible dismissal for failure to follow a statutorily required procedure. This case clarifies that is no longer necessary.

***The View Condominium Owners Association v. MSICO, LLC*, 127 P.3d 697 (Utah 2005)**

Facts - In this case the Utah Supreme Court issued an opinion in a dispute over the effect of amending a condominium plat map but not the associated covenants. Among other things, the condominium owners association claimed that a regulatory taking had occurred.

Decision - The Supreme Court held the association did not "establish the elements necessary to succeed on its claim of regulatory taking." The case reiterates the standard for finding a regulatory takings claim under Utah law:

"Pursuant to their police power, state and local governments may enact regulations that do not constitute an unlawful taking. In *Colman v. Utah State Land Board*, we recognized: Many statutes and ordinances regulate what a property owner can do with and on the owner's property. Those regulations may have a significant impact on the utility or value of property, yet they generally do not require compensation under article I, section 22 [of the Utah Constitution]. Only when governmental action rises to the level of a taking or damage under article I, section 22 is the State required to pay compensation. In other words, a taking is not merely any interference with private property, but is a "substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed." Indeed, the police power allows government, "without compensation," to "regulate and restrain the use of private property when the health, safety, morals, or welfare of the public requires or demands it." Regulations promulgated under that power "are not considered as appropriating private property for a public use, but simply as regulating its use and enjoyment."

Commentary - This case illustrates the difficulty of proving a takings claim when other viable uses remain. Compare *Diamond B-Y Ranches* with the comments here regarding "use" and "value".

XV. Variance

Save Our Canyons v. Board of Adjustment of Salt Lake County, 116 P.3d 978 (Utah App. 2005)

Facts - In a prior related case the Court upheld the granting of variances to allow construction of a hillside road. SOC claimed the record did not include substantial evidence to support the variances. The County approved a 52 lot subdivision of the property as well as an access road at the mouth of a canyon. After the water department notified the developer that it objected to the access road's site, the developer redesigned a new access road. After initially denying a developer's request, the Board of Adjustment voted to grant three variances. SOC appealed a lower court decision to uphold the Board's decision.

Decision - The Board had the authority to grant the developer a variance from this ordinance, and the Board's decision was supported by substantial evidence in the record. SOC argued the Board's grant of three variances was arbitrary, capricious, and illegal because its decision was not supported by substantial evidence. However, the Court refused to consider the claim because SOC did not marshal any facts to support it. The Court found the variances were legally granted and refused to address a claim of ex parte contacts. There was no other location available for an access road on the property. Moreover, literal enforcement of the zoning ordinance would have denied the developer access to its adjoining property and would have prohibited all development potential of that parcel. The Board properly found the proposed road could be built in a way that substantially complied with the other ordinance requirements.

Commentary - This case not only illustrates the application of this substantial evidence rule. It also indicates the duty of a challenger to marshal evidence to support a claim.